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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM G. BURGIN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

There are three basic but related questions:

1. Whether the Petitioner, a state legislator, was denied his constitutional rights of due process and to be advised of the charges against him by his conviction of violation to Title 18, Section 371 U.S.C., which, in pertinent part, broadly prohibits conspiracies "to defraud the United States", when none of the acts complained of were illegal, no federal or state statutes or regulations were violated, no corruption, dishonesty, deceit, craft, trickery, fraud, bribery, kickbacks, or proscribed acts were shown, no government right or function was impeded, impaired or defeated, the United States suffered no loss of its money or property, and the

contract entered into by the Welfare Department, paid for with state funds, part of which were subsequently reimbursed by the government, was fully performed?

2. Whether, particularly in view of the recent holding of this Court in *U.S. v. Gillock,* 100 S.Ct. 1185, 63 1.Ed.2d 454 (1980) that a state legislator has no privilege or immunity preventing his official legislative acts from being used against him in a federal criminal prosecution, the use of 18 U.S.C. 371 to superintend the ethical propriety and quality of state legislative process, in absence of clear and convincing evidence of concrete, identifiable harm to the government, is an unconstitutional undermining of important federalism concerns, calculated to destroy the federal system.

3. Whether the admission in evidence of out-of-court statements of alleged non-testifying co-conspirators, not subject to cross-examination, made outside of the presence of Petitioner without the prior determination by the trial judge that substantial, independent evidence existed i) of a conspiracy, ii) the declarant's membership in such conspiracy, and iii) that the declarations were in the course of and in furtherance of the conspiracy, when coupled with a statement of the trial judge to the jury that a government witness "should have been named" as a member of the conspiracy, deprived Petitioner of the Fifth and Sixth Amendment rights; namely, the right to due process of law, the right to a fair trial by an impartial jury and the right to confrontation and cross-examination of witnesses against him.

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William G. Burgin, Jr., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at ____ F.2d ____, where it is styled United States of America vs. William G. Burgin, Jr. and David Flavous Lambert, Jr., No. 79-5304. There is no District Court opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1980 (App. B). A Petition for Rehearing En Banc was denied without opinion on September 15, 1980 (App. C, infra), and on September 30, 1980, the Court of Appeals granted a stay of issuance of the mandate until October 23, 1980, to enable Petitioner to employ counsel and file this Petition (App. D, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Amendments V and VI to the Constitution of the United States.
2. Title 18, Section 371, United States Code.
3. Rule 104, Federal Rules of Evidence.

STATEMENT OF CASE

Petitioner, a member of the Mississippi State Senate, was indicted on two counts, one charging violation of 18 U.S.C., Section 371, and the other a violation of the Hobbs Act, 18 U.S.C. 1951 and 1951. A jury trial resulted in Petitioner's conviction on the conspiracy count with his co-defendant, Lambert, and acquittal of both defendants on Count II. Petitioner was sentenced for 15 months and fined $10,000. The Court of Appeals affirmed.

In the summer of 1975, Dr. Helvey, Vice President of Learning Development Corporation (LDC), a Tennessee company that provided services to such programs as Head Start pre-school training projects, had occasion to meet one Robert Broome who interested Helvey in selling his services in Mississippi.

Broome suggested to Helvey that Lambert, a former state senator, was knowledgeable in the operation of many departments of Mississippi State government and Broome, with Helvey's concurrence, arranged a meeting between Helvey and Lambert.

Subsequently, LDC hired Broome by contract with Bob Broome and Associates, to seek out business prospects for LDC in Mississippi and other states. Broome, in turn, made an arrangement to obtain Lambert's help and to pay Lambert. Compensation for Broome and Lambert was, by contract, 50% of the amount of business they obtained for LDC.

Through Lambert's efforts, LDC President Goodner met appropriate officials of the Mississippi State Department of Public Welfare (DPW) and subsequently negotiated and obtained a fixed price contract with DPW in the amount of $379,000 for the 1976-77 school year, under which LDC

provided certain services to Head Start Programs, sponsored and funded by DPW, seventy-five percent of such expenditures being subsequently reimbursed by the United States Department of Health, Education and Welfare (HEW). A second contract for the 1977-78 school year was later executed for $480,000.00. Immediately after LDC began receiving money under its contract with DPW, Broome received payment from LDC and in turn, Broome paid Lambert.

When Lambert periodically received money under his contract with Broome and later under a direct contract from LDC, he made payments totaling $83,000.00 to Burgin, his long-time friend and attorney, for long-standing debts incurred from 1958 through 1968 owed to Burgin by Lambert for legal services. Payments by Lambert to Petitioner were by checks, which Petitioner deposited in his bank account, reported for state and federal income taxes, and approximately $47,000.00 of the amount received by Petitioner was paid to the federal and state governments for such taxes.

During the period LDC performed under the contracts, Lambert sought and received help from many acquaintances in state government in promoting the interest in LDC but at no time did Lambert actually perform work in providing services which LDC furnished to DPW under its contract.

Some of the money paid LDC was appropriated by the Appropriations Committee of which Burgin was chairman, but only after it was approved and recommended by a subcommittee of the full committee of which he was not a member, by the full Senate Appropriations Committee, the Senate as a body, by the House of Representatives, and comparable committees there. The money appropriated to and used by DPW to support the LDC contract was dealt with routinely by the State Legislature, and was in no way

ear-marked or otherwise designated to pay the LDC contract. Use of the money was left to the sole discretion of appropriate officials of DPW, subject to rules and regulations of HEW.

When the government offered testimony at the trial of unindicted co-conspirator Broome, Petitioner objected, under the authority of *United States v. James,* 510 F.2nd 546 (1978), since at that point in the trial no conspiracy had been established. The motion was denied, and the trial court applied the hearsay rule of *United States v. Apollo,* 476 F.2nd 156 (1973), since the Court of Appeals granted rehearing en banc on the James rule and no final decision had been rendered.

Throughout the trial, Petitioner moved for exclude evidence and for severance on the grounds that evidence extremely prejudicial to him was admitted but only as to Lambert, including alleged declarations of Lambert, who did not testify in his own behalf and could not be called as a witness or cross-examined by Petitioner. These motions were denied.

During the trial, Petitioner moved for mis-trial when the trial judge in the presence of the jury stated that the government witness Goodner "probably should have been indicted" as a co-conspirator, thereby advising the jury that the court believed a conspiracy to exist when no substantial, independent evidence thereof admissable against Petitioner had been offered. The motion was likewise denied.

REASONS THE PETITION SHOULD BE GRANTED

This Court held that the Federal Courts have an affirmative duty to carefully scrutinize indictments under the broad language of the conspiracy statute because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the guilty. *U.S. v. Dennis,* 384 U.S. 855, 860 (1966, *Krulewitch v. U.S.,* 336 U.S. 440, 445-58 (1949). The question is whether the Defendant's conduct "plainly and unmistakably" falls under the proscription of 18 U.S.C. 371. *U.S. v. Gradwell* 243 U.S. 476, 485 (1917).

Pared to essentials, the Government's case against Burgin, described as an "influential" state legislator, can be reduced to the single theme — that of alleged unethical conduct. The supporting evidence viewed most favorable to the Government, is of two general kinds. First, Burgin contacted stated administrative officials in connection with the LDC contracts; second, Burgin used his legislative position to facilitate the availability of state funds in connection with those contracts. These activities were alleged to have "defrauded" the United States, contrary to 18 U.S.C., Section 371, even though it is admitted and the Court below found that the LDC contracts were legal, fair and were fully performed.

The District Court charged the jury in broad, general terms as to the meaning of Section 371. This general charge was in keeping with the Government's broad view of Section 371. In its opposition to Burgin's motion for acquittal, for example, the Government argued that the "broad boundries of the offense . . . are apparent . . . It involves much more than the common notion of fraud . . ." and the "scheme through

which a fraud is administered is also not subject to precise definition . . ." The Government's argument in the District Court is replete with language of this character.

In the Government's view Section 371 is a general catch-all, a bottomless repository for reaching any conduct not meeting its view of the appropriate standards of conduct. But Section 371 is a criminal, not a civil statute. To give Section 371 a sweep so wide as the Government suggests would render it constitutionally infirm because the "crime" would not in fact be defined until the statute was applied to the acts of a defendant. More specifically, Section 371 is not a license to the federal courts to impose jail sentences while working out a code of government ethics to be applied to state officials who have some connection with federally funded projects. Any such view of Section 371 transgresses both due process and federalism concerns.

On the Government's evidence, Burgin's conduct, as a legislator may involve a question of ethics. But, Section 371 is a fraud statute, not a general ethics statute, and every alleged unethical act does not automatically result in "defrauding" the United States. *U.S. v. Porter,* 591 F.2d 1048 (5th Circuit, 1979). Whether Burgin's acts were ethical or not, the Government, here, has not proved that the United States has been defrauded of anything. The Government has not suffered any pecuniary loss; nor has some lawful function been "impaired, obstructed or defeated." The Government in the District Court could not specify the fraud that occurred. The allegation, in inflated language, amounts only to the Government's disapproval on ethical grounds, of Burgin's conduct.

Once the insufficiency of the Government's general ethics approach is made plain, it becomes apparent that there is no meaningful distinction between this case and *Porter*. The only distinction is that Burgin was a state legislator and that fact cuts sharply against the propriety of applying Section 371 in this case for the result is to allow the Federal Government to scrutinize the quality of the state legislation process. Federal criminal statutes are traditionally construed not to undermine important federalism concerns. *United States v. Bass*, 404 U.S. 336, 349 (1979), *United States v. Enmons*, 410 U.S. 396, 410-12 (1976). At minimum such an application of Section 371 is inconsistent with that important canon of statutory construction. It is, in a real sense, unconstitutional under the doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), to use Section 371 to superintend the ethical propriety of the state legislative process, at least absent clear and convincing evidence that the Government suffered concrete, identifiable harm as a result of that "lack" of quality.

The basic requirement of due process mandates that all men — even if they hold public office — be informed as to what the State commands or forbids. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). As held by this Court in *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926);

> "... a statute which either forbids or required the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Therefore, to avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. *Rabe v. Washington*, 405 U.S. 313, rehearing denied, 406 U.S. 911 (1972). Criminal

prohibitions must be clearly defined in order to assure that individuals are forewarned of the consequences of their conduct. *Grayned v. City of Rockford,* 408 U.S. 104 at 108 (1972); *Bouie v. City of Columbia,* 378 U.S. 347 (1974); *United States v. Harris,* 347 U.S. 612 (1954). It is admitted that no federal statute, regulation, rule or order, nor any state prohibition made it a crime for petitioner to do any act or acts complained of by the government. No statute, regulation, rule or order required that he disclose to DPW. HEW, the FBI, Justice Department, or anyone else, under penalty of prison, that Lambert owed him money for past legal services.

The Government contended, and the judgment complained of holds, exertion of influence by a public official is a violation of Section 371, if in any way, for any reason, *no matter how legal or legitimate,* the official indirectly thereafter received any money from contract proceeds, even though the United States obtained all that it bargained for, the contract price was fair and reasonable, the contracts were valid, legal and laudable in purpose.

II

Manifest prejudice, rising to obvious denial of Petitioner's Fifth and Sixth Amendment rights, resulted from the refusal of the trial judge to prevent jury consideration of extra-judicial hearsay statements of alleged co-conspirators in absence of a prior finding by the judge — not the jury under purportedly cautionary instructions — that the government had first proven by *substantial, independent evidence,* the existence of a conspiracy, the membership of the declarant and Petitioner therein, and that the offered hearsay was uttered in the course of and in furtherance of such conspiracy. See Rule 104, Federal Rules of Evidence and *United States v. James,* 576 F.2d 1121 (5th Circuit, 1978— "James I").

The trial judge followed the rule of *United States v. Apollo,* 476 F.2d 156 (5th Circuit, 1973) which was expressly overruled by *United States v. James,* 590 F.2d 575, (5th Circuit, 1979 — "James II"), in which that court held that: co-conspirator's declarations in a conspiracy trial:

"endanger the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. . .

. . . A rule that puts the admissibility of co-conspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of the statements without first dealing with the admissibility question. It was the same danger which motivated the Supreme Court to hold in *Jackson v. Denno,* 378 U.S. 268, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that a criminal defendant is entitled to have a "reliable and clear-cut determination of voluntariness of (his) confession, including the resolution of disputed facts upon which the voluntariness may depend" made by someone other than the jury which is to determine his guilt or innocence." 590 F.2d at 579.

This Court set the required standard in *United States v. Nixon,* 418 U.S. 683 (1974):

"Declarations by one defendant may also be admissible against other defendants upon a showing by independent evidence[14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." 418 U.S. at 701.

Footnote 14 to that opinion, in turn, contains the significant language:

"As a preliminary matter, there must be *substantial, independant* evidence of a conspiracy, at least enough to take the question to the jury . . . . Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge." 418 U.S. at 701, n.14.

Petitioner was denied the required protection. This Court

spoke to the danger, extreme prejudice, breach of the right of confrontation and cross examination, and lack of due process in *Jackson v. Denno, supra,* and held the *Appollo* procedure to which Petitioner was subjected, to be unconstitutional in *United States v. Bruton,* 391 U.S. 123 (1968), which involved an analgous declaration or confession of a non-testifying co-defendant. As stated by Mr. Justice Stewart in his concurring opinion:

> "Quite apart from *Jackson v. Denno,* however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when highly damaging out-of-court statements of a co-defendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause. . . is that certain kinds of hearsay. . . (citation omitted). . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence that minimal weight it logically deserves *whatever* instructions the trial judge may give." 391 U.S. at 133.

Compound the prejudice of the extra-judicial co-conspirator statements admitted against Petitioner, with the denial of an opportunity to cross-examine the declarant, Lambert, and with the statement of the trial judge to the jury that a government witness "should have been named" as a co-conspirator, at the time when not a syntilla of evidence had been introduced to prove a conspiracy or Petitioner's involvement, and the unconstitutional result is obvious. Denied due process, denied confrontation of witnesses against him, denied the right to cross-examine his alleged co-conspirators, and damned by the statements of the trial judge to the jury, Petitioner had no chance of acquittal — even though no crime was committed or proved. He did not have a

fair and impartial trial.

The constitutional rights that are guaranteed Petitioner have, to this point, been disregarded and denied him. Justice has been aborted. This Court must act if he is not to become a political prisoner.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William G. BURGIN, Jr. and David Flavous Lambert, Jr.,
Defendants-Appellants.

No. 79-5304.

United States Court of Appeals, Fifth Circuit.

July 24, 1980.

Defendants, a state senator and chairman of the appropriations committee and a former state senator, were convicted in the United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., of conspiracy to defraud the United States and they appealed. The Court of Appeals, Garza, Circuit Judge, held that: (1) indictment, which charged that defendants were involved in a silent scheme whereby the state senator, in exchange for remunerattion, was to use his political influence as an elected official to insure that state funds would be appropriated or to exert influence in his official capacity on various state officials in order to enable another to enter into or maintain contracts financed by federal funds, charged a violation of statute proscribing conspiracy to defraud the United States in any manner or for any purpose; (2) evidence was sufficient for jury to infer that state senator's influence was upon director of the Department of Public Welfare was purchased

in exchange for money from the former state senator, who received a portion of the money paid to another under contracts with the Department; (3) district court's comment that another individual probably should have been named a conspirator was not reversible error; and (4) district court did not abuse its discretion nor did the former state senator show prejudice in the denial of part of his motion for a bill of particulars.

Affirmed.

Appeals from the United States District Court for the Southern District of Mississippi.

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

GARZA, Circuit Judge:

In the Summer of 1975, Dr. Charles Helvey, Vice President of Learning Development Corporation (LDC), a Tennessee business concern formed to conduct behavioral modification programs, met Robert Broome. Mr. Broome inquired of Dr. Helvey if LDC has sought to sell its services in Mississippi. Although LDC's activities had been confined to Tennessee, Dr. Helvey became interested in the idea and a meeting in Jackson, Mississippi was arranged.

A few months later Dr. Helvey met with Mr. Broome and former Mississippi state senator Defendant David Flavous Lambert. It was suggested to Dr. Helvey that Defendant Lambert was familiar with Mississippi governmental affairs and could be helpful in LDC's relations with Mississippi agencies. Subsequently, LDC entered a contract with Bob Broome and Associates on a contingent basis to assist in its sale efforts. Broome and Associates, in turn, made an

arrangement with Lambert to assist in contacting state agencies. Broome and Associates were to receive 50% of any amount received under contracts with Mississippi agencies.

Following arrangements made through Broome and Lambert, R. Lee Goodner, President of LDC, met with various state agencies seeking a contract for LDC services. After several meetings with officials of the Mississippi Department of Public Welfare (DPW), Mr. Goodner negotiated and entered into a $380,000 fixed price contract with Fred St. Clair, Commissioner of DPW, in which LDC was to provide services to various Head Start centers in Mississippi for the 1976-77 school year. The funding for this contract, as in the one which would follow the next year, was provided from 75% federal Title XX funds (42 U.S.C. §1397 *et seq.*) and 25% from state funds. Pursuant to the prior arrangement, LDC paid Broome and Associates almost $190,000 in eight installments for the duration of this first contract.

Commissioner St. Clair had only recently assumed his position with DPW at the time of the LDC contract and felt that it would be in his department's best interest to cultivate a good relationship with Defendant-Senator William G. Burgin, Jr., Chairman of the State Senate Appropriations Committee. On several occasions in conversations between Defendant Burgin and St. Clair, Burgin inquired as to the status of the Head Start training program. In December of 1976, DPW delayed its payment to LDC and Burgin inquired of St. Clair whether any problems had been encountered.

In the early part of 1977, Goodner and Lambert approached St. Clair to negotiate a contract for the 1977-1978 school year. In May, 1977 a $480,000 contract was

executed. The contract provided for similar services as the prior one but covered a larger geographical area. By the time this second contract went into effect, Broome's involvement with LDC had largely ended and his 50% portion of the DPW-LDC contract was paid to Development Associates, an Alabama corporation created by Lambert. Approximately $164,000 was paid to Development Associates under this second contract.

Prior to completion of the first contract, St. Clair decided to terminate the LDC program. However, St. Clair was contacted by Burgin and asked to wait until expiration of the first contract to make that determination whether to continue the program. In the Summer of 1977, LDC was requested by DPW to increase its performance bond to conform to that required of other contractors. After being informed of this, Burgin indicated to St. Clair that there was no need for an increased bond. St. Clair relented and LDC's bond requirement stayed the same.

In the Fall of 1977 due to problems encountered with the LDC program, DPW delayed payments to LDC. On December 22, Defendant Burgin inquired as to the reason for the delay and asked DPW to prepare a check for LDC that day since LDC needed the money for Christmas. Burgin personally picked up the check for LDC.

In the Spring of 1978, LDC submitted its proposal for a third year. Commissioner St. Clair sent the proposal to the regional office of the United States Department of Health, Education and Welfare for approval. Burgin contacted St. Clair and encouraged St. Clair to get the proposal approved. Because of the federal investigation, the third contract was never entered into.

In summary, of the two DPW-LDC contracts amounting to $860,000, approximately $354,000 was paid out by LDC

to either Bob Broome Associates or Development Associates. Of this amount, Broome received approximately $50,000; Lambert received approximately $220,000; and Burgin received approximately $83,000. The payments to Burgin came through monies paid to Lambert. Lambert and Burgin both testified that the funds paid to Burgin were in settlement of an outstanding debt owed by Lambert to Burgin and for Burgin's performance of legal services.

It is undisputed that Burgin prepared both the LDC—Bob Broome and Associates contract and the LDC—Development Associates contract and that he knew from the outset that 50% of the DPW—LDC funds would be paid to either Bob Broome and Associates or Development and Associates. It is also undisputed that some of the money paid to LDC was appropriated by the Appropriations Committee of which Burgin was chairman. However, the appropriations were approved and recommended by the Appropriations' sub-committee of which Burgin was not a member and the full Senate voted for the appropriations as a body. Additionally, there is nothing to indicate that the appropriations were dealt with in a manner not routine and the use of the appropriated money was within the sole discretion of DPW officials.

Defendants Burgin and Lambert were indicted on two counts. Count I charged a violation of 18 U.S.C. § 371 by conspiring to defraud the United States Government of its governmental functions and the right to have the transaction of official business of the United States Department of Health, Education and Welfare conducted honestly, impartially and with integrity as the same should be conducted, free from corruption, fraud, improper and undue influence, dishonesty, unlawful impairment and obstruction.[1]

[1]Count I is reproduced in entirety as an appendix.

Count II charged a Hobbs Act violation of 18 U.S.C. § § 1951 and 1952 in that Burgin and Lambert did obstruct, delay and effect commerce by extorting cash and negotiable instruments from LDC by the wrongful use of fear of economic loss and under color of official right.

A jury trial resulted in both defendant's acquittal on Count II and verdict of guilty as to Count I. Burgin was sentenced to fifteen months, Lambert was sentenced to twenty-four months, and both were fined $10,000. Burgin and Lambert have appealed raising several points of error.

SUFFICIENCY of the INDICTMENT

Defendants, Burgin and Lambert, were charged with the second part of § 371 which, in broad terms, prohibits conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose . . ."[2] They argue that Count I is defective in that it fails to charge conduct amounting to criminal conspiracy. Specifically, they contend that giving § 371 as broad a sweep as given in this case will render the statute constitutionally infirm because the supposed crime would not be defined until the statute was applied to the acts of the defendants. The question for our determination is whether the conduct charged in Count I "plainly and unmistakably" falls within the proscription of § 371. *U. S. v. Porter,* 591 F.2d 1048, 1055 (5th Cir. 1979).

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[2]18 U.S.C. § 371 provides:

> Conspiracy to commit offense or to defraud United States.
> If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[1] In *Hammerschmidt v. U.S.*, 265 U.S. 182, 44 S.Ct. 511, 68 L.Ed. 968 (1924), the Supreme Court interpreted §371:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, *but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.* (emphasis added) 265 U.S. at 188, 44 S.Ct. at 512.

More recently, in *Dennis v. U. S.*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), the Court stated that §371 reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." It is now clear that the term "defraud" as used in §371 not only reaches financial or property loss through employment of a deceptive scheme, but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies. See *U. S. v. Johnson,* 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1965); *Haas v. Henkel,* 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569 (1910); *Crawford v. U. S.*, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed. 465 (1909); *U. S. v. Brasco,* 516 F.2d 816 (2nd Cir. 1975), cert. den. 423 U.S. 860, 96 S.Ct. 116, 46 L.Ed.2d 88 (1975); *Shushan v. U. S.*, 117 F.2d 110 (5th Cir. 1941); *U. S. v. Sweig,* 316 F.Supp. 1148 (S.D.N.Y.1970).

In support of the indictment, the government argues that the meaning of "defraud" includes any scheme of "influence

peddling" whereby a public official receives remuneration for the exertion of influence upon other officials in order for another to gain the upper hand in some financial transaction with the government. Although no pecuinary loss to the government has occurred, the government contends that the mere exertion of influence by a public official *having a covert financial interest* is a violation of § 371.

The defendants argue that to apply § 371 in circumstances where the government has suffered no pecuniary loss would amount to no more than a code of governmental ethics to be applied to any state official having some connection with federally funded projects. In support of their argument, the defendants rely heavily on *U. S. v. Porter, supra,* wherein this court held that if the government has suffered no pecuniary loss from the activities set forth in the indictment, the indictment can stand only if it alleges that some lawful function of the government has been impaired, obstructed or defeated. In the *Porter* case, the government contended that the United States had been defrauded of its right to have the Medicare program conducted honestly and fairly because of the business practices employed by the defendant doctors. This court held that where purely private parties were under no legal duty to act differently than they had been acting the government had failed to demonstrate interference with any of its lawful functions.

[2] However, in *Porter,* this Court through Chief Judge Coleman, expressly recognized that "no public officials were bribed or *participated in the scheme*." 591 F.2d at 1055. The indictment in this case charged overreaching of an agent of the United States by a public official having a financial quid pro quo interest in a federally financed contract. If that allegation does not amount to obstruction of a lawful governmental function, it is hard to imagine an

indictment which would. Therefore, we hold that the alleged involvement of Burgin and Lambert in a silent scheme whereby Burgin, in exchange for remuneration, was to use his political influence as an elected official to insure that state funds would be appropriated or to exert influence in his official capacity on various state officials in order to enable another to enter into or maintain contracts financed by federal funds, charges a violation of 18 U.S.C. §371.

SUFFICIENCY of the EVIDENCE

[3] In a corollary to their attack of the indictment, the defendants complain that the evidence is insufficient to sustain their convictions. Reviewing sufficiency of the evidence questions we must view the evidence supporting the convictions in the light most favorable to the government and all credibility choices and inferences must be made in support of the jury's verdict. Although most of the evidence against the defendants is circumstantial, our test is whether reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence.

In support of their contention, the defendants point to the evidence showing the legality and fairness of the DPW—LDC contracts. Indeed, the evidence clearly shows that no influence was directly exerted by Burgin upon the agent for the DPW in the initial contract negotiations with LDC. Although a conflict in testimony shows a dispute arose as to the quality of LDC's performance, the evidence establishes that LDC fully performed under the contract and was entitled to full payment. In fact, it is undisputed that the DPW—LDC contracts were completely valid in a strict legal sense. Unfortunately, the arguments of defendants

equate absence of pecuniary loss with absence of impairment, obstruction or defeat of the lawful functions of an agency of the government.

[4] The thrust of the charges are that Burgin and Lambert conspired to impair and obstruct the government by using Burgin's official capacity to influence state appropriations and influence official action of the DPW. While virtually no evidence, direct or circumstantial, exists regarding Burgin's influence on the appropriations of money, there does exist evidence both of a Lambert-Burgin conspiracy and of Burgin's undue influence on St. Clair, the director of DPW. This wrongful influence constitutes the "defrauding" of the government. The overt acts of Lambert and Burgin in furtherance of the alleged conspiratorial objective are not disputed.

[5,6] The testimony of St. Clair was that the first DPW—LDC contract was partly the result of Burgin's influence and that the second contract was due solely to Burgin's intercessions in the DPW's operation. The testimony was also clear that Burgin hindered the operations of DPW on several occasions which resulted in lessening the contractual performance of LDC and in expediting payments under the contracts. Although the defendants contended the payments from Lambert to Burgin were for legal services, the evidence was sufficient for the jury to infer that Burgin's influence was purchased in exchange for the money from Lambert. The fact that certain actions of either Burgin or Lambert, when viewed as separate occurrences, may not have been illegal does not eliminate their illegality when together they constitute a plan of influence for pay the result of which is to deprive the government of the unobstructed operations of its federally funded program.

ADMISSION of CO-CONSPIRATOR HEARSAY STATEMENTS

During the trial, the government was allowed to introduce hearsay statements of discussions between Lambert and others before any independent evidence of a conspiracy between Burgin and Lambert was introduced. The trial court properly gave cautionary instructions on the limited use of this hearsay testimony as set out in *U. S. v. Apollo,* 476 F.2d 156 (5th Cir. 1973). The defendants at trial objected to such procedure and urged that the panel decision in *U. S. v. James,* 576 F.2d 1121 (5th Cir. 1978), should control the admission of the statements.

While the en banc decision in *U. S. v. James,* 590 F.2d 575 (5th Cir. 1979), upheld but modified the panel decision, the trial in this case was conducted after petition for rehearing en banc was granted. The effect of the granting of rehearing en banc was to vacate the earlier panel decision. *U. S. v. Gutierrez-Barron,* 602 F.2d 722 (5th Cir. 1979); U.S. Ct. of App., 5th Cir., Rule 17. Additionally, the en banc decision specifically held the new procedure was to be only prospectively applied after the expiration of thirty days following the latter decision. Therefore, the defendant's point of error in this case must fail.

MOTION for MISTRIAL

Following certain testimony regarding a meeting attended by Lambert and LDC's President Goodner, the trial court instructed the jury as to the use that could be made of the statements in regard to Burgin's guilt. At this point, Burgin's counsel moved for a severance because Goodner had not been named as a co-conspirator. The trial judge then stated:

> Of course, Goodner is not named as a co-conspirator in Count I of the indictment, although the indictment charges each of the defendants with conspiring with each other and with others known and unknown to the grand jury and *he probably should have been named* . . .

The defendants contend that this statement by the judge clearly indicated to the jury that a conspiracy did exist and therefore contaminated the jury's function of determining whether a conspiracy existed.

The government argues the statement most probably would not give the jurors the impression that a conspiracy existed, but rather that Goodner should have been indicted as a member of the *alleged* conspiracy. Furthermore, the government contends that if any harm was done, it was done to its case since it was the government, not defendants, which was relying on Goodner's testimony.

[7] Certainly the comment was an error by the trial court. However, the statement occupied only a few seconds of the trial and the judge gave curative instructions to disregard the statement. We do not feel the trial court's comment so prejudiced the jury as to deprive defendants of a fair trial and, therefore, we find no reversible error. *U. S. v. Onori,* 535 F.2d 938 (5th Cir. 1976); *U.S. v. James,* 510 F.2d 546 (5th Cir. 1975).

BILL of PARTICULARS

Defendant Lambert complains that the trial court erred in affirming the Magistrate's denial of all but three of Lambert's forty-three questions on Count I. Lambert claims he was unable to adequately prepare his defense due to the vague allegations of the indictment.

[8,9] A defendant possesses no right to a bill of

particulars and the decision on the motion lies within the discretion of the court. *Will v. U.S.*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *U. S. v. Sherriff*, 546 F.2d 604 (5th Cir. 1977). The defendant has the burden of showing prejudice or a clear abuse of discretion.

[10,11] The function of a bill of particulars is to enable the defendant to prepare for trial and avoid prejudical surprise as well as providing protection against a subsequent prosecution for the same offense. *U. S. v. Murray*, 527 F.2d 401 (5th Cir. 1976). It is not designed to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial. *U. S. v. Sherriff, supra; Downing v. U. S.*, 348 F.2d 594 (5th Cir. 1965), *cert. denied*, 382 U.S. 901, 86 S.Ct. 235, 15 L.Ed.2d 155 (1965). After reviewing Lambert's requests we conclude that the court below did not abuse its discretion nor has Lambert shown prejudice in the denial of part of his motion.

LEGISLATIVE PRIVILEGE

Defendant Burgin argues that Rule 501 of the Federal Rules of Evidence recognizes the existence of a common law privilege barring use of any of his official legislative acts as evidence against him. However, the recent decision of the Supreme Court in *U. S. v. Gillock*, ____ U.S. ____ , 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), holds, that in a federal criminal prosecution against a state legislator, Rule 501 provides no legislative privilege barring the introduction of evidence of the legislative acts of the defendant. Burgin's argument is without merit.

CONCLUSION

A fair summary of the evidence presented by the government shows that Defendant Burgin, a state senator and Chairman of the appropriations committee, and his associate, Defendant Lambert, a former state senator, being aware that 50% of the Learning Development Corporation charges to the Department of Public Welfare were being paid indirectly and later directly to Lambert with a large portion going to Burgin, used their influence in assuring that Learning Development Corporation obtained and retained its contract with the Department of Public Welfare. Aware of this, Burgin should have advised the Department of Public Welfare that the contract could have been entered for much less. However, he failed to do so and conspired with Lambert to keep the Department ignorant of his personal gain from the transactions. This exemplifies influence peddling of the rankest kind.

AFFIRMED.

Appendix

The Grand Jury charges:

COUNT I

1. That from on or about April, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of Mississippi, and elsewhere, WILLIAM G. BURGIN, JR. and DAVID FLAVOUS LAMBERT, JR., defendants herein, knowingly and willfully did conspire and agree together, and with each other, and with other persons known and unknown to the Grand Jury, not named as defendants herein, to defraud the United States of and concerning its governmental

functions and rights, that is, of and concerning its right to have its business and its affairs, and particularly the transaction of the official business of the United States Department of Health, Education, and Welfare, conducted honestly, imparttially, and with integrity as the same should be conducted, free from corruption, fraud improper and undue influence, dishonesty, unlawful impairment and obstruction.

2. That from on or about October 1, 1975, to the date of the filing of this indictment, there was in existence a program of federal financial assistance whereby the United States, through the Secretary of the Department of Health, Education, and Welfare, would provide funds to the various States for social service endeavors, such program being established by and described in Title XX of the Social Security Act, as amended, specifically Section 1397 *et seq.*, Title 42, United States Code, with the monies received by the States being commonly referred to as "Title XX funds."

3. That at all times material herein, the State Department of Public Welfare was an administrative agency of the State of Mississippi and as such was responsible for the administration of funds received from the United States pursuant to the program described in Paragraph 2 hereinabove.

4. That at all times material herein, Learning Development Corporation was a business entity incorporated under the laws of the State of Tennessee having its principal offices in the State of Tennessee and established to provide educational and training services in the fields of learning deficiencies, behavior modification, and motivation enhancement.

5. That from on or about October 1, 1976, to on or about June 30, 1978, Learning Development Corporation possessed a contract with the State Department of Public Welfare by which Learning Development Corporation

agreed to administer various social service programs with remuneration to Learning Development Corporation from the State Department of Public Welfare to consist in large part of funds received by the State of Mississippi pursuant to the program described in Paragraph 2 hereinabove.

6. That at all times material herein, WILLIAM G. BURGIN, JR. was Mississippi State Senator and Chairman of the Mississippi State Senate Appropriations Committee.

7. That it was part of the conspiracy described in Paragraph 1 hereinabove that DAVID FLAVOUS LAMBERT, JR. would assist in the conduct of the affairs of Learning Development Corporation concerning its contractual relationships within the State of Mississippi.

8. That it was a further part of the conspiracy that WILLIAM G. BURGIN, JR., would use and exert his position and influence as a State Senator and Chairman of the Mississippi State Senate Appropriations Committee upon Fred W. St. Clair, Commissioner of the State Department of Public Welfare, and other State of Mississippi officials in order to enable Learning Development Corporation to obtain and maintain contracts with the State of Mississippi and its agencies.

9. That it was a further part of the conspiracy that WILLIAM G. BURGIN, JR., would use and exert his position and influence as a State Senator and Chairman of the Mississippi State Senate Appropriations Committee to insure that state appropriations were available and sufficient to enable the State of Mississippi and its agencies to obtain and maintain contracts with Learning Development Corporation.

10. That it was a further part of the conspiracy that a portion of the remuneration received by Learning Development Corporation pursuant to its contracts with the

State of Mississippi and its agencies would be funds obtained by the State of Mississippi from the United States.

11. That it was a further part of the conspiracy that DAVID FLAVOUS LAMBERT, JR. would obtain from Learning Development Corporation a portion of the remuneration received by Learning Development Corporation pursuant to its contracts with the State of Mississippi and its agencies.

12. That it was a further part of the conspiracy that the monies obtained by DAVID FLAVOUS LAMBERT, JR., from Learning Development corporation would be distributed among DAVID FLAVOUS LAMBERT, JR., WILLIAM G. BURGIN, JR., and, at times, other persons known and unknown to the Grand Jury.

13. That it was a further part of the conspiracy that the financial interests of WILLIAM G. BURGIN, JR., as described hereinabove, would be concealed from the knowledge of State of Mississippi officials as well as the knowledge of the general public.

OVERT ACTS

In furtherance of the conspiracy and to promote and accomplish its objectives, the co-conspirators committed certain overt acts in the Southern District of Mississippi and elsewhere, including:

1. In late 1975 or early 1976, DAVID FLAVOUS LAMBERT, JR. met with R. Lee Goodner, Jr., President of Learning Development Corporation, to discuss the possibility of Learning Development Corporation obtaining a contract in the State of Mississippi.

2. In or about April, 1976, DAVID FLAVOUS LAMBERT, JR. attended a meeting with officials of the State Department of Public Welfare at which the interest of Learning Development Corporation in securing a contract was discussed.

3. In or about August, 1976, WILLIAM G. BURGIN, JR. met with Fred W. St. Clair and sought his support for Learning Development Corporation's proposed contract.

4. In or about October, 1976, WILLIAM G. BURGIN, JR. met with Fred W. St. Clair, again seeking support for Learning Development Corporation.

5. On or about November 23, 1976, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $2,834.00.

6. On or about December 14, 1976, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $13,838.00.

7. In late 1976 or early 1977, WILLIAM G. BURGIN, JR. called Fred W. St. Clair and inquired about the performance of Learning Development Corporation.

8. On or about February 8, 1977, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $4,346.00.

9. On four to six occasions, in 1977, DAVID FLAVOUS LAMBERT, JR. presented a check drawn on the account of Learning Development Corporation and payable to "Bob Broome and Associates" to an employee of the Fidelity Bank, Jackson Mississippi, requesting a five thousand dollar cash payment and deposit of the remainder in the accounts of Lambert and Bob Broome.

10. In or about the spring of 1977, WILLIAM G.

BURGIN, JR. called Fred W. St. Clair and expressed concern over difficulties being experienced in negotiations between Learning Development Corporation and the State Department of Public Welfare.

11. In or about August, 1977, WILLIAM G. BURGIN, JR. had a conversation with Fred W. St. Clair expressing dismay over the bonding requirements being imposed upon Learning Development Corporation.

12. In the late summer of 1977, WILLIAM G. BURGIN, JR., had a conversation with Fred W. St. Clair informing St. Clair not to be concerned over the Budget Commission's recommendation for the State Department of Public Welfare budget because additional funds could be added by the State Senate if necessary.

13. On or about December 22, 1977, WILLIAM G. BURGIN, JR. obtained a check from the State Department of Public Welfare intended as payment to Learning Development Corporation.

14. On or about December 30, 1977, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $8,500.00.

15. On or about February 2, 1978, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the amount of $8,506.00.

16. On or about March 1, 1978, DAVID FLAVOUS LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $6,182.00.

17. During the first half of 1978, WILLIAM G. BURGIN, JR. met with Fred W. St. Clair inquiring whether a $750,000 state appropriation would be sufficient to fund a future Learning Development Corporation contract.

18. On or about March 23, 1978, DAVID FLAVOUS

LAMBERT, JR. executed a check payable to WILLIAM G. BURGIN in the approximate amount of $8,600.00.

19. In or about May, 1978, DAVID FLAVOUS LAMBERT, JR. met with Fred W. St. Clair and expressed his chagrin over the fact that St. Clair had sent a proposed contract with Learning Development Corporation to the regional office of the United States Department of Health, Education and Welfare.

All in violation of Section 371, Title 18, United States Code.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-5304

D. C. Docket No. J78-00021-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM G. BURGIN, Jr., and
DAVID FLAVOUS LAMBERT, Jr.,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

Before AINSWORTH, INGRAHAM and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 24, 1980

ISSUED AS MANDATE:

APPENDIX C

United States Court of Appeals
FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

OFFICE OF THE CLERK
September 15, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-5304 U.S.A. -vs- WILLIAM G. BURGIN, JR., and DAVID FLAVOUS LAMBERT, JR.,
(J78-00021 (N)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) of the petition( ) for rehearing en branch has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Peggy O, Keller

Deputy Clerk

cc: Mr. William E. Spell
Mr. Joe Sams, Jr.,
Mr. Henry Paul Monaghan
Mr. James B. Tucker
Mr. Michael C. Farrow

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5304

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM G. BURGIN, JR., and
DAVID FLAVOUS LAMBERT, JR.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

O R D E R:

( ) The motion of appellant WILLIAM G. BURGIN, Jr., for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local rule 17, as amended January 22, 1979.

( ) The motion appellant, WILLIAM G. BURGIN, JR., for stay of the issuance of the mandate pending petition

for writ of certiorari is GRANTED to and including October 23, 1980, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED TO and including _____ , under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Illegible

_____

UNITED STATES CIRCUIT JUDGE